PRIME REAL ESTATE
versus
KNIGHT FRANK
and
S. MASUKU
And
OLSHEVIK INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 28 July 2011; 13 September 2011; 21 September 2011;
17 February 2012 and 15 March 2013

CIVIL TRIAL

O.T. Gasva, for the plaintiff
D Charamba, for the defendants

BERE J. At the material time the plaintiff was leasing 2nd floor apartment of Robinson House, Harare from the third defendant through the first defendant who had been duly appointed as the third defendant's managing agent.

The second defendant was employed by the first defendant as a property manager and it was through him that the tenancy of the plaintiff was managed.

On 11 September 2009 the second defendant instructed that the second floor be disconnected of electricity. There was no agreement between the plaintiff and the second defendant as to why electricity was disconnected.

The second defendant's position was that the electricity was disconnected to avert a crisis or potential danger as it was discovered that there had been dangerous electrical connections which were causing the some suspicious noise from the main electricity distribution board.

In contrast the plaintiff's position was that the untimeous disconnection of electricity was intended to induce tenants with arrear rentals to pay but in the process this ended up affecting tenants like the plaintiff who were up to date with their rental payments.

The plaintiff's case was that the disconnection of the electricity was without warning. Despite the second defendant's initially spirited denial that he had pre-warned the plaintiff about the disconnection of electricity on 11 September 2009 the second defendant after being asked by the court subsequently conceded that he did not pre-warn the plaintiff of the disconnection of electricity on the day in question.

That having been established the court must consider whether or not there was any causal link between the accepted conduct of the second defendant and the liability attributed to the defendants.

A party desiring to claim damages must strive to put before the court conclusive evidence that is aimed at sustaining such a claim. A claim for damages is not just like a walk in a park and that claim is not supportable by conjecture and speculative evidence.

As ROSE INNES AJ observed in the case of *Monumental Art and Company* v *Kenston Pharmacy (Pvt) Ltd* 1976 (2) SA 111 (c) at 118 E.

> "------ it is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or an inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of the loss could be made."

The plaintiff's claim of $7 550 was clearly unsubstantiated. There was virtually no attempt by the plaintiff to lay down the factual foundation of that claim – it remained a figure plucked from the air. No trading books were produced to substantiate the naked averment that that figure was likely to be generated within one week of the alleged deprivation of electricity to the plaintiff by the defendants. Nothing further need to be said about this claim as it remained unsubstantiated.

The plaintiff's claim of a sum of US$22 500 was supposed to be commission from the abortive sale of property worth US$300 000-00. The plaintiff alleged in its declaration that it was the conduct of the defendants in disconnecting electricity which led to the failure by the plaintiff to conclude the sale with a potential buyer who had committed himself to the sale transaction.

This claim was anchored on exhibits 1, 2 and 3. Exhibit I was an irrevocable offer from the potential purchaser to purchase the property in issue for US$300 000-00 on certain terms

contained in the offer itself. This offer was supposed to remain in force until 18 September 2009.

Exhibit 2 was the mandate given to the plaintiff by the seller to dispose of the property in question for a sum of US$375 000 with a provision for negotiations on the price.

Exhibit 3 was an email which was said to have emanated from the potential purchaser advising the plaintiff about his decision to withdraw his offer (exh I). The reason given for the withdrawal of the offer in that email was the alleged failure by the plaintiff to maintain communication with the potential buyer. The plaintiff alleged in its claim that its inability to maintain communication with the potential purchaser was caused by the untimeous disconnection of electricity by the defendants.

It will be noted that exhibit I was supposed to remain in force until 18 September 2009. Curiously however, exhibit 3 purported to withdraw the offer on 17 September 2009, a day before it had completed its full life.

The authenticity of exh 3 was put into question by the defendants through their witness one Lloyd Jinga whose basic knowledge of information technology was in my view beyond reproach. The authenticity and or validity of this exhibit was further compounded by the failure by the plaintiff to call both the sender of the email message as well as the service provider Mweb which could have confirmed the authenticity of the email.

Exhibit 6 was introduced through Lloyd Jinga and through it this witness who for all intends and purposes should be regarded as an expert witness, was able to demonstrate that exhibit 3 was potentially deceptive and that it was ill-advised for anyone to religiously accept it as conclusive evidence of what it stood for. The possibility of exhibit 3 being a pierce of manufactured evidence calculated to punish the second defendant because of the acrimonious relationship that existed between him and the plaintiff is more real than imaginary.

It is equally curious why the plaintiff (at a time disruption in the supply of electricity was the order of the day) did not strive to use other alternative methods of communicating with its potential buyer of the property as reflected in exh 4 which originated from the plaintiff, which incidentally suggests that the plaintiff was already embarking on legal action against the defendants even before receiving an indication of the cancellation of the sale transaction. All these distortions in the plaintiff's case heightened the court's suspicion of the plaintiff's claim.

There are so many reasons why a potential buyer would decide to riggle out of an imminent or promised purchase. It could be anything ranging from inability to raise the purchase price within the specified time or merely a change of heart on the transaction itself.

In conclusion, I am more than satisfied that the plaintiff has not been able to establish its claim on the accepted level of proof. The claim must be dismissed.

The issue of costs

In virtually all civil proceedings the award of costs is largely the discretion of the court. In this regard INNES CJ had this to say;

> "The rule of our law is that all costs, unless extremely otherwise enacted are in the discretion of the Judge. His discretion must be judiciously exercised."

Generally speaking costs should follow the results but this is not a rule of thumb. Where there are compelling reasons to do so, the court can depart from this general proposition.

I believe there are compelling reasons why the defendants should be drived of an order of costs.

I have not the slightest doubt in my mind that it was wrong for the defendants to switch off electricity without prior warning to the plaintiff. For this reason the defendants must be deprived of an order of costs.

Consequently, the plaintiff's claim is dismissed but with no order as to costs.

1. *Kruger Bros and Wasserman* v *Ruskin* 1918 AD 63 at p 68

Messrs Chirimuuta and Associates, plaintiff's legal practitioners
Messrs Hangazha and Charamba, defendants' legal practitioners